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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW DEAN BAKER,

Defendant and Appellant.

C070863

(Super. Ct. No.  
CM035676)

Defendant Matthew Dean Baker pled no contest to second degree burglary and the trial court sentenced him to three years in county jail. (Pen. Code,<sup>1</sup> §§ 459, 461, 1170, subd. (h).) On appeal, defendant contends that the trial court erred by failing to order a section 1203.03 diagnostic evaluation before imposing sentence. He adds that he received ineffective assistance of

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

counsel because his attorney did not request the evaluation. Disagreeing with both contentions, we shall affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

A business owner, alerted by his dog barking, found defendant standing in the business's garage on the morning of December 27, 2011. Defendant asked for a job. The owner said he was not hiring and escorted defendant through the garage toward the front door. Unable to open his office door, the owner rolled up the garage door and let defendant out through the garage. After discovering that the office door had boot marks on it, as if it had been kicked, the owner called the police.

Defendant told responding officers that he was in the area looking for a job and saw a fire on the roof of the business. He looked inside and saw a man lying back in a chair and bleeding heavily. Unable to get the man's attention, he tried to kick the front door open, but failed. Then he jumped the fence to try to get in the back and get someone's attention. At that point, he was stopped by the owner.

The People charged defendant with second degree burglary (count 1) and a prior prison term enhancement. (§§ 459, 667.5.) Defendant changed his plea on count 1 to no contest with a *Harvey*<sup>2</sup> waiver, in return for the trial court's dismissal of the enhancement and of pending misdemeanor charges. The trial court

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<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

denied probation and sentenced defendant to three years in county jail.

### **DISCUSSION**

Defendant contends the trial court abused its discretion by not ordering a diagnostic report sua sponte before imposing sentence because the "just disposition of the case require[d] such diagnosis[.]" (§ 1203.03, subd. (a).) Section 1203.03 applies "[i]n any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison[.]" (§ 1203.03, subd. (a).) Since second degree burglary is not punishable by imprisonment in the state prison (§§ 651, 1170, subd. (h)), section 1203.03 does not apply to defendant's case.

Defendant asserts for the first time in his reply brief that the legislative history of section 1203.03 supports its application to a sentence of county jail under realignment, as does its "underlying purpose."

We do not ordinarily consider contentions raised for the first time in the reply brief without a showing of good cause for failure to raise them sooner. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) Further, where statutory language is clear and unambiguous, we need not and should not consider legislative history or an alleged "underlying purpose" not stated in the statute's plain terms. (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.)

Here, the express restriction of section 1203.03 to cases involving potential state prison terms is clear and unambiguous.

Further, defendant's arguments are unsupported by citation to any actual legislative history.

Because section 1203.03 *on its face* applies *only* to defendants convicted of an offense punishable by imprisonment in the state prison, and here defendant was *not* convicted of an offense punishable by imprisonment in the state prison, we reject his claim that the trial court abused its discretion by failing to applying an inapplicable statute *sua sponte*.

In light of our conclusion, defendant's claim of ineffective assistance of counsel necessarily fails. Counsel had no duty to seek remedies not provided for by existing law.

**DISPOSITION**

The judgment is affirmed.

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DUARTE, J.

We concur:

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BUTZ, Acting P. J.

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MURRAY, J.